IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.A.ABDUL GAFOOR
&
THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

MONDAY, THE 1ST JANUARY 2007 / 11TH PAUSHA 1928

WA.No. 1395 of 2004()

{IN O.P.NO.20447/1998 OF THIS COURT}
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APPELLANT: APPLICANTS/APPELLANTS/RESPONDENTS:
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1. *THE STATE OF KERALA, REPRESENTED BY ITS CHIEF SECRTARY, SECRETARIAT, THIRUVANANTHAPURAM.*

2. *THE COMMISSIONER & SECRETARY, PUBLIC WORKS AND TRANSPORT (F) DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.*

3. *THE ACCOUNTANT GENERAL, THIRUVANANTHAPURAM.*

BY GOVERNMENT PLEADER

RESPONDENT: RESPONDENT/PETITIONER:

K. RAMAKRISHNAN NAMBIAR, O M NIVAS, NIRMALA GIRI, KANNUR.

BY ADV. SRI.M.P.ASHOK KUMAR
SRI.C.MURALIKRISHNAN (PAYYANUR)

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 01/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R"

K.A.ABDUL GAFOOR &
K.R.UDAYABHANU, JJ.

W.A.No.1395 of 2004 E

Dated this the 1st day of January, 2007.

JUDGMENT

Abdul Gafoor, J.

This appeal is by the State. By the impugned judgment, recovery ordered from the first respondent/writ petitioner has been quashed on the ground that it is in respect of the loss allegedly sustained by Government on account of certain misconducts alleged to have been committed more than 4 years before the initiation of the proceedings.

2. It is submitted by the Government Pleader assailing the judgment that the period of limitation of four years mentioned in Clause (b) to the proviso to Rule 3 Part III of the Kerala Service Rules [KSR] is concerning the proceedings initiated against a retired

employee if such action had not been initiated during his employment. In the case of proceedings initiated while a pensioner was in service, Clause (a) to the proviso to Rule 3 alone will apply. It does not provide for any limitation.

3. But at the same time, to sustain the judgment, it is submitted by the first respondent/writ petitioner that the limitation period provided in Clause (b) shall have to be applied to the cases falling in Clause (a) as well; because such a provision is intended to safeguard the interest of the incumbents facing allegations effectively. It is further submitted that the judgment has to be sustained, as the action taken was violative of the proviso to Clause (b) which requires consultation with the Public Service Commission, which is absent in this case. It is further submitted that in effecting the recovery from pensionery benefits, the provision

contained in Article 304(b) of the Kerala Financial code has to be strictly followed. That has not been done in this case. Therefore, there is no reason for interference, the first respondent/writ petitioner submits.

4. The facts relating to this case are as follows:

The first respondent/writ petitioner was an Assistant Engineer. During 1980-81 he was working in Kuthuparamba Block. Far later, there were certain allegations in relation to certain work there under the control of the first respondent/writ petitioner. According to the disciplinary authority, there were serious misconduct and lapse in supervising the work. This resulted in loss sustained by government. So, Ext.P1 charge memo was issued on 24.7.1989. This was responded to by filing a statement of defence on 15.3.1990. Soon after that, on

30.4.1990, he retired from service. At that time, disciplinary action initiated as per Ext.P1 had not been finalised. It was continued even after his retirement. The Enquiry Officer drew up Ext.P3 report finding him guilty of certain supervisory lapses which resulted in pecuniary loss to the Government to the tune of Rs.3,12,012/-. Accordingly, Ext.P4 show cause notice was issued on him proposing to recover the loss caused by him, including from his retiral benefits. This was replied to in Ext.P5. Considering the reply, the Government issued final orders in Ext.P6 directing realisation of an amount of Rs.3,12,012/-, including recovery from the pensionery benefits to the extent possible. This was implemented by Ext.P7, directing to recover the said amount and a further amount of Rs.36,124/- on another count. It was thereupon that the petitioner approached this court challenging the said recovery.

5. Rule 3 Part III Kerala Service Rules provides as follows:

> ***"3. The Government reserve to themselves the right of withholding of withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement:"***

6. This rule reveals that the Government has reserved two rights:

(a) of withdrawing or withholding of pension or any part of it; and

(b) the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government.

7. These two, or either of these two can be done only if the incumbent is found guilty of grave

misconduct during the period of his service, in a departmental or judicial proceedings. Proviso (a) to the said Rules provides that:

> ***"Such departmental proceeding, if instituted while the employee was in service, whether before his retirement or during his re-employment, shall after the final retirement of the employee, be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.***

Ext.P1 charge memo was issued on 24.7.1989 long before his retirement on 30.4.1990. As per the said provision, that departmental proceedings could be continued and concluded by the authority who issued Ext.P1 charge memo as if the first respondent had been continuing in service. It does not contain any period of limitation, as contended by the writ petitioner for the purpose of continuing such departmental proceedings.

8. But Clause (b) to the proviso reads as follows:

> ***"Such departmental proceeding, if not instituted while the employee was in service, whether before his retirement or during his re-employment,--***
>
> > ***(i) shall not be instituted save with the sanction of the Government.***
> > ***(ii) shall not be in respect of any event which took place more than four years before such institution; and***
> > ***(iii) shall be conducted by such authority and in such place as the Government may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the employee during his service."***

9. Clause (b) is in respect of departmental proceedings for withdrawing or withholding pension or to order recovery from pension in cases where such proceedings were not initiated while the employee is in service. It is only in that situation, the limitations that it should be instituted with the

sanction of the Government and that it shall not be in respect of any event which took place more than 4 years are stipulated.

10. On the other hand, when the departmental proceeding had been initiated while the incumbent had been in service, it could be continued by the authority who initiated the proceedings. No period of limitation is prescribed in Clause (a) to the proviso mentioned above. But if it is instituted after the retirement of the incumbent, it shall be only with the sanction of the Government and shall not be in respect of an event which took place beyond 4 years of such institution.

11. The learned single Judge quashed Exts.P6 and P7 solely on the ground that the initiation of proceedings as per Ext.P1 charge memo dated 24.7.1989 was in respect of incident occurred during the period 1981-82 and as the gap between

the date of event and the date of institution of proceedings was more than 4 years. Thus, it is clear that the learned single Judge applied the limitation period prescribed in clause (b) to the proviso to quash the proceedings covered by Clause (a). Of course, the learned single Judge had relied on two decisions reported in **Sadasivan Pillai v. State of Kerala {1983 K.L.T. 142}** and **Kuttikrishnan v. State of Kerala {1999(2) K.L.T. 313}.** Both these are decision by single Judges, the latter being by one among us [Abdul Gafoor,J.].

12. The former among these two decisions is in respect of a proceedings initiated after the retirement of the incumbent concerned. Even though there is a general observation that the disciplinary action cannot be initiated beyond 4 years, that has to be considered in the light of the facts arising in that case that it was a situation covered by Clause (b) of

the proviso to Rule 3 Part III of the Kerala Service Rules, viz., initiation of the proceedings after the retirement of the incumbent concerned. Of course in **Kuttikrishnan 's case,** facts are similar to the one on hand i.e. an action initiated while the incumbent was in service and concluded after his retirement. In that case, without noticing the difference between Clause (a) and (b) finding that proceedings initiated issuing a charge sheet while in service can be continued and shall be deemed as one under Rule 3 Part III of the Kerala Service Rules by reason of Clause (a) to the proviso thereto, it was concluded that:

> ***"that shall not be in respect of any event which took place more than four years before the institution of the proceedings."***

This was without noticing that the period of such limitation is in Clause (b) covering initiation of action

in respect of a retired incumbent only. Of course, there was another defect in the order challenged in that case that the recovery ordered was not after due enquiry which was essential requirement. True, that judgment has been confirmed in appeal, W.A.No.2668/99, without referring to the former aspect, but affirming on the latter aspect. Therefore, the decision in **Kuttikrishnan'**s case as confirmed by the judgment in W.A.No.2668/99 cannot be taken as an authority to sustain the contention of the first respondent/writ petitioner.

13. Clause (a) and (b) of the proviso to Rule 3 Part III of the Kerala Service Rules cover different situations of departmental proceedings. The former is in respect of the action commenced while the incumbent was in service and the latter, while the incumbent had retired. Only in the latter case the limitation is provided.

14. Otherwise, it may lead to an anomalous situation. In respect of a person in service disciplinary action can be initiated in terms of Kerala Civil Services (Classification, Control and Appeals) Rules alleging an event causing loss occurred even 20 years earlier and could be finalised while in service, while another proceeded for similar misconduct which resulted in loss to Government just 5/6 years before his retirement could not have been continued after his retirement. Such is not the situation expected of in Clause(a) and (b). A person in service, against whom disciplinary action is initiated, is bound to answer the charges, in spite of his retirement. But so far as a retired person is concerned at the time of his retirement, if there are no proceedings pending, he would have a belief that he will have a peaceful retirement life. Such a person should be given the protection with a period of

limitation. Therefore, there is clear nexus between Clause (a) and (b) of the proviso to Rule 3 Part III KSR to differentiate. The limitation in Clause (b) to the provision cannot be read into Clause (a). The disciplinary action contemplated in the Kerala Civil Services (Classification, Control and Appeals) Rules shall be the yardstick for continuing the action initiated under Rule 3 Part III Kerala Service Rules in order to direct recovery from a pensioner.

15. The contention centered around Article 303 (a) and (b) of the Kerala Financial code also does not have any application to this case. A reading of Article 303(a) reveals that an enquiry shall be there in order to fix the liability. An enquiry has already been conducted in terms of Rule 3 in this case wherein a finding had already been arrived at with regard to the guilt of the first respondent/petitioner and consequential loss

sustained by Government. Therefore, there is substantial compliance of the enquiry part contemplated by Article 303(a). As regards Article 303(b), the stipulations contained therein is in respect of fixing the liability of a Government servant otherwise than by way of disciplinary action, which is mentioned in Clause (a) therein. This is clear from the stipulation that wherever disciplinary action is taken, only provisional pension should be sanctioned.

16. So far as the challenge against the enquiry report is concerned, we cannot subject it to judicial review. A reading thereof reveals that it is based on some evidence, which the inquiring authority has appreciated. We cannot sit in appeal over it. When there is some evidence to come to the conclusion therein, this court cannot reverse the findings in that report. The report has to be accepted. That cannot be quashed.

17. It is true that Clause (d) of proviso to Rule 3 Part III KSR provides for consultation with Public Service Commission, before final orders are issued in proceedings under the said rule. But, this consultation shall be regulated by the Kerala Public Service Commission (Consultation) Regulations. Consultation is required only in case of recovery from Pay, going by Clause 6(1()(a)(ii) of that Regulation. Moreover, it is also not shown that any prejudice has been caused to the writ petitioner due to the non-consultation. In such circumstance, consultation as a statutory requirement, is not followed, it cannot be held that it vitiates the entire proceedings.

18. At the same time, the second count of amount covered in Ext.P7 recovery notice is not the subject matter of Ext.P1 charge memo. Either in the counter affidavit or in the writ appeal it is not substantiated how such amount was sought to be

recovered. Therefore, that recovery ordered in Ext.P7 cannot be sustained in this case. So, Ext.P7 cannot be pressed into service to realise that amount of Rs.36,124/-. If there are any other proceedings in respect of it, necessarily, the findings in such proceedings shall have to be awaited.

Accordingly, allowing the appeal in part and setting aside the judgment impugned, we direct that the amount of Rs.3,12,012/- can be realised as ordered in Exts.P6 and P7.

Sd/-
(K.A.ABDUL GAFOOR)
JUDGE

Sd/-
(K.R.UDAYABHANU)
JUDGE

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P.S. To Judge.

K.A.ABDUL GAFOOR &
K.R.UDAYABHANU, JJ.

W.A.No.1395 of 2004 E

JUDGMENT

1st January, 2007.